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SIPDIS

SENSITIVE
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STATE FOR EB/IPE - J. Boger
STATE PASS USTR - J. Choe-Groves
STATE PASS AID/LAC
USDOC FOR 4332/ITA/MAC/MSIEGELMAN
USDOC FOR 3134/ITA/USFCS/OIO/MKESHISHIAN/BARTHUR
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SUBJECT: OPTIONAL 2007 SPECIAL 301 REPORT

REF: A) STATE 07944; B) 06 SAN SALVADOR 464

¶1. (SBU) Summary: One year since CAFTA-DR's entry into force, El Salvador has made little headway in IPR protection. Law enforcement agencies are making some use of their new ex-oficio powers, but there remains unfamiliarity with those powers in some offices. Resource constraints and other law enforcement challenges are also a hindrance to improved IPR protection. Authorities have yet to establish regulatory systems to provide data protection to pharmaceuticals or agricultural chemicals. Post continues to support training and technical assistance to support El Salvador's efforts to implement CAFTA-DR IPR commitments. End summary.

Notorious Markets

¶2. (U) Infringing goods are readily available in cities throughout El Salvador, usually in informal markets. The largest concentration of such goods is offered for sale by informal vendors of DVDs and CDs who have built stalls along 4a. Avenida Sur y Norte in downtown San Salvador, a few blocks east of the Central Market.

Optical Media Piracy

¶3. (SBU) The Civilian National Police (PNC) and Attorney General's Office have targeted large-scale distributors of optical media over the last year in an effort to maximize scarce resources and minimize potential public opposition to targeting street vendors. In 2006, authorities seized 194,610 pirated DVDs and CDs, down from 331,046 units seized in 2005. Also seized was equipment used to produce optical media. Meanwhile, local industry association Promotion and Protection of Intellectual Property (FOMPI) reports that 26 million blank optical media were imported in 2006.

¶4. (U) FOMPI and other industry groups report the police are effectively using limited resources to target distributors, but that the Attorney General's Office has been unwilling to aggressively use new ex-oficio (CAFTA-DR required) enforcement powers. FOMPI representatives report that the Attorney General's Office still requires a complaint from the original rights holder (not a licensee or distributor) before continuing with an investigation and eventual prosecution.

Use/Procurement of Government Software

¶5. (U) Representatives of the Business Software Alliance (BSA) and Ministry of Economy are working together on a new campaign to eliminate illegal software from government computers. The legal framework for that cooperation is an Executive Order dated February 20, 2006, requiring government offices to use legitimate software.

The first step in the campaign is an inventory of government software, which is scheduled for completion in March 2007. Government offices are to report the results of the survey to the Ministry of Finance, which will incorporate procurement of legitimate software in the budget process. The most recent survey of government software use, which BSA conducted in 2002, indicated that the piracy rate was 25 percent. It identified the following offices for their flagrant use of unlicensed software: Ministry of Health, Electoral Council, National Civilian Police, Human Rights Office, and the Public Defender's Office.

TRIPS Compliance, FTA Implementation and Other IP Related Issues

¶6. (U) Ref. B summarizes legislation passed in December 2005 to meet CAFTA-DR IPR obligations. Reforms included the extension of copyright protection from 50 to 70 years, extension of pharmaceutical patent terms from 15 to 20 years, and establishment of data protection pharmaceuticals (five years) and agricultural chemicals (ten years). Also significant were amendments to the Penal Code intended to strengthen law enforcement efforts to discipline IPR violations, including a provision to allow enforcement agencies to seize suspected pirated and counterfeit goods, the equipment used to produce them, and documentary evidence.

Data Protection

¶7. (SBU) Despite CAFTA-DR obligations that El Salvador provide test-data protection for new pharmaceuticals and agricultural chemicals, such protection is still not available one year after the trade agreement's entry into force. The Superior Council for Public Health (CNSP), which is tasked with providing marketing approval for new drugs, is working with the Ministry of Economy and National Registry Center (CNR) to prepare an implementing regulation for data protection and patent linkage. Meanwhile, the Ministry of Agriculture is working with the Ministry of Economy on an implementing regulation for agricultural chemicals. However, interagency squabbles and a lack of transparency in the consultative process for developing these regulations have led to numerous delays. In October 2006, at Post's insistence, the Ministry of Economy shared a draft regulation on data protection for drugs with industry representatives PhRMA and FEDEFARMA. FEDEFARMA provided feedback on the regulations, and as of February 2007 Ministry of Economy officials report the regulation is near completion. A draft for agricultural chemicals is not yet available.

Production, Import, and Export of Counterfeit Goods and Enforcement

¶8. (SBU) See paragraph 3 for information on enforcement issues related to optical media. Trademark violations are also widespread, most notably for clothing and footwear. BSA estimates the rate of software piracy at 80 percent, despite a 2006 campaign that encouraged 213 businesses to purchase licensed software. In the first part of 2006, BSA representatives reported difficulties working with the Attorney General's Office on software piracy cases similar to those described in paragraph 3. However, they report more aggressive investigation and prosecution in recent months, thanks in part to the naming of a new Attorney General who previously headed the CNR.

¶9. (U) The Attorney General's Crimes against Private Property and Intellectual Property Unit is responsible for criminal enforcement of IPR laws in the metropolitan area of San Salvador. Three prosecutors in that office work part-time on IPR cases. In the rest of the country, IPR cases are handled by different regional and sub-regional offices of the Attorney General, but there are no specialized units. The National Police financial crimes unit supports the Attorney General's Office, but it also conducts its own investigations and raids. The number of officers in that office was recently cut in half from more than 600. Many of those officers were re-assigned to units focusing on the prevention and investigation of gang-related violent crime, a severe problem in El Salvador.

¶10. (SBU) There was one conviction on an IPR-related crime in 2006, the result of a guilty plea. There is a widespread view that most Salvadoran judges lack adequate legal preparation to adjudicate IPR cases. Currently, IPR violations are seen in mercantile and penal

Courts, and there are no specialized IPR courts.

¶11. (SBU) McDonald's is involved in a trademark dispute, and related contractual dispute, with a former franchisee. In June 2003, the Supreme Court ruled in favor of McDonald's and the company was allowed to remove infringing names and arches from the restaurants of the former franchisee. In December 2005, an appeals court ruled against McDonald's on a related contractual issue, awarding the former franchisee \$24 million in compensation and damages. McDonald's is appealing the ruling to the Supreme Court.

Treaties

¶12. (U) The WIPO Performance and Phonograms Treaty entered into force in El Salvador on May 20, 2002, while the WIPO Copyright Treaty entered into force on March 6, 2002.

Training

¶13. (U) Post supports a variety of IPR training opportunities for Salvadoran officials. In 2006, Econoffs identified fifteen Salvadoran judges, prosecutors, police, and other officials to participate in USPTO training sessions on topics such as patent examination, law enforcement, and genetic resources. The Public Affairs Section has organized videoconferences on IPR issues and encouraged U.S. artists in El Salvador on USG-funded travel highlight IPR. Econoffs have also helped government officials access private-sector expertise to help implement CAFTA-DR obligations related to IPR. For example, Post encouraged PhRMA to provide technical assistance to draft an implementing regulation for data protection and patent linkage.

¶14. (U) Post also helped Ministry of Economy officials contact IFPI representatives to develop a conversion program for vendors of pirated optical media. In early 2006, Post's ICE Attaché organized training for police, prosecutors, and judges on how to enforce the new IPR laws, especially the ex-oficio search and seizure provisions. In March 2007, ICE will sponsor a regional conference on IPR enforcement in San Salvador. In May 2007, OPDAT and INL will sponsor a workshop at which the participants will create a standard operating procedure manual for conducting criminal investigations of IPR violations. A second workshop is planned for judges who will create a bench book to serve as a guide for managing IPR trial cases.

Butler